Supreme Court, U.S.
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Case N0. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1999

David Phillips,

Petitioner,

vs.

State of Alabama

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Fifth Amendment to the United States Constitution as interpreted by *Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) violated by the Alabama rule of law that, without regard to its content, the alleged victim's testimony alone is always sufficient to establish a prima facie case of either rape or sexual abuse requiring the trial court to submit the charge to the jury and prohibiting the Alabama courts from thereafter reversing any conviction for insufficiency of the evidence?
2. Is it a violation of the Fifth Amendment for the State of Alabama in criminal cases to substitute for the substantial evidence standard a *per se* rule that the alleged victim's testimony alone always establishes a prima facie case of either rape or sexual abuse requiring the trial court to submit the charge to the jury and prohibiting the Alabama courts from thereafter reversing any conviction for insufficiency of the evidence?
3. Can a rational jury constitutionally convict a defendant of a criminal offense charging rape or sexual abuse on less than substantial evidence?
4. Can a jury constitutionally convict a defendant of a criminal offense charging rape or sexual abuse contrary to or against the overwhelming evidence?
5. Is there an exception for criminal offenses charging rape or sexual abuse to the requirement of the Fifth Amendment that no person may be convicted of a criminal offense on less than substantial evidence?
6. May a criminal defendant be constitutionally convicted of a criminal offense charging rape or sexual abuse of a person under 12 on so-called "generic evidence" alone where the defendant was not a resident in the same domicile with the alleged victim?

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OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals dated February 5, 1999, is reproduced in Appendix A. The order of the Supreme Court of Alabama dated August 20, 1999, denying the Petition for Certiorari to the Alabama Court of Criminal Appeals is reproduced at Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The statutes involved in this case are set out in Appendix D. Those statutes are: *Code of Alabama*, 1975, §§ 13A-6-63 and 66.

STATEMENT OF THE CASE

This prosecution was initiated by Michelle James, the mother of the minor allegedly sexually abused by the Petitioner. Ms. James filed the affidavit/warrant on January 17, 1997, charging Petitioner with deviant sexual intercourse with the minor, Whitney Levert, under *Code of Alabama*, 1975, § 13A-6-63. ("Clerk's Record ("CR")-20) No time or place was alleged as to when or where the charged behavior took place.

Petitioner was given a preliminary hearing. He was bound over to the grand jury on February 26, 1997. (CR-15) The indictment was returned on August 16, 1997, charging Petitioner with four counts: Count One charged "deviate sexual intercourse" with Whitney Levert who was less than 12 while the Petitioner was more than 16 years of age in violation of *Code of Alabama*, 1975,

§ 13A-6-63; Count Two charged deviate sexual intercourse with Whitney Levert "by forcible compulsion" in violation of the same statute; Count Three charged "sexual contact by forcible compulsion" with Whitney Levert in violation of *Code of Alabama*, 1975, § 13A-6-66; and Count Four charged subjecting "to sexual contact Whitney Levert who was less than 12 years of age" while the Petitioner was 16 years of age or older in violation of *Code of Alabama*, 1975, § 13A-6-66[1] No time or place as to when or where the offenses allegedly occurred was stated in the indictment.

On November 7, 1997, Petitioner filed a motion to require the State to elect which event or incident would serve as the basis of the prosecution of each count since Whitney Levert, the minor prosecutrix had testified at the preliminary hearing to an unspecified number of alleged occurrences. (CR-39) The record does not reflect that this motion was ever ruled on. No election was ever made by the prosecution.

On the same date, Petitioner filed a motion for more definite statement as to the allegations against which he would be called upon to defend because the testimony of the minor prosecutrix, Whitney Levert, was so erratic that definite charges could not be identified.

On January 16, 1998, the State responded to the motion for more definite statement by filing the following statement:

> "The incident/offenses occurred at 5516 Court J, Ensley, Birmingham, Alabama. The incidents occurred between September of 1991 and September 1992 while Whitney Levert was in the

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[1]There was a subsequent indictment for first degree rape that was consolidated with the earlier indictment for trial. The jury could not reach a verdict on this charge and it was dismissed after the trial by the prosecutor.

> care of the babysitter. The defendant touched Whitney Levert on her private parts and performed vaginal and oral intercourse and deviate sexual intercourse by force on Whitney Levert." (CR-49)

On May 18, 1998, Petitioner filed a motion to suppress the testimony of Whitney Levert on the grounds of her age and the effect of suggestive interviews on the testimony she would give. Petitioner cited *State v. Michaels*, 642 A.2d 1372 (N.J. 1994) as holding under similar circumstances that the testimony of a minor prosecutrix ought to be suppressed. (CR-56-57) A hearing was held by the trial court after the jury was struck in this case, but before the trial actually began. Whitney Levert, the minor prosecutrix, testified at the hearing. (T-67-88) The trial court concluded that she was a competent witness. (T-88)

The trial was held May 18 to May 20, 1998. Counts One and Two were dismissed at the close of the prosecution's case. (CR-4) Counsel for Petitioner made a motion for judgment of acquittal at the end of the prosecution's case on the ground that the evidence was insufficient as a matter of law to submit the case to the jury. (T-227) The trial judge overruled the motion and gave the following as his reason: "Well, sir, as you know, in Alabama we don't require corroboration of a prosecutrix (sic) complaint. I think this is a hallmark jury question." (T-227) The case was thus submitted to the jury on one count of first degree rape, one count of first degree sodomy, and one count of first degree sexual abuse. (T-319-329)

The jury returned a verdict of guilty as to first degree sodomy and first degree sexual abuse under Counts One and Four of the indictment. The jury could not agreeon the rape charge and it was dismissed. Petitioner was sentenced to ten years imprisonment on the first degree

sodomy count and to a consecutive five years imprisonment on the first degree sexual abuse count. (T-397)

Petitioner appealed to the Alabama Court of Criminal Appeals asserting among other grounds that the evidence was constitutionally insufficient to support his conviction. In a memorandum opinion dated February 5, 1999, that court affirmed Petitioner's conviction. (Appendix A) The court gave as the sole basis for the affirmance that under the Alabama *per se* rule that the testimony of the victim alone is always sufficient to establish a prima facie case of either rape or sexual abuse, the evidence was sufficient to "prove a prima facie case of first degree sexual abuse and first degree sodomy" against Petitioner. (App. A at 2) The court relied on *Pierson v. State*, 677 So.2d 830 (Ala.Cr.App. 1996) which it stated held that "The testimony of the victim alone is sufficient to establish prima facie case of either rape or sexual abuse." (*Id.*) and *Glover v. State*, 610 So.2d 1253 (Ala.Cr.App. 1992), which it stated held that under Alabama law "once a prima facie case is established, evidentiary issues concerning the weight and credibility of the evidence are not reviewable on appeal." (*Id.*)

On February 19, 1999, Petitioner filed in the Alabama Court of Criminal Appeals an application for rehearing pursuant to Rule 40, Ala.R.App.P. and a motion pursuant to Rule 39K, Ala.R.App.P. for the court to adopt the facts cited by the Petitioner. The application reasserted Petitioner's claim as to the constitutional insufficiency of the evidence. Both the application and the motion were denied on March 26, 1999.

Petitioner filed on April 9, 1999, a petition for writ of certiorari to the Alabama Supreme Court raising the issue of insufficiency of the evidence. The petition asserted, among other grounds, that the only evidence against the Petitioner in this case was "generic evidence" and that such evidence was not "substantial evidence" as

required by due process considerations to sustain a criminal conviction. The Supreme Court of Alabama denied the certiorari petition without opinion on August 20, 1999. (App. B).

STATEMENT OF THE FACTS

The only evidence against the Petitioner was the confused and generic testimony of the twelve year old prosecutrix, Whitney Levert, who testified as to alleged sexual conduct between Petitioner and herself that took place when she was "four or five". (T-112-113)[2] She had previously told a counselor at a "child advocacy center" that the sexual contacts took place when she was six and that she specifically remembered this because she and her family had moved to Alabama when she was five. (T-190) However, at trial the prosecutrix said this was wrong and that she had moved to Alabama when she was three years old. (T-130131) She admitted she was doing some guessing in her testimony. (T-135)[3]

The prosecutrix testified that she at relevant times stayed at her Grandmother Bernice's house while her

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[2]Petitioner's counsel objected to the prosecutrix being allowed to testify as to what took place when she was four years old. In overruling the objection, the trial court stated, "As you know, that is going to be a question for the jury." (T-113)

[3]Petitioner's counsel objected to the witness speculating and guessing. In overruling the objection, the trial court stated: "I'm going to let you cross-examine her, of course, very carefully, sir. I traditionally let children have a little more latitude and old folks, for that matter, in making their statement to the jury, okay? So, we're kind of being liberal here in letting the young lady tell her story. Admittedly, I am being a little permissive." (T-115) Of course, the jury heard this statement and was no doubt influenced to follow the example set by the judge. Thus, the idea of relaxed standards for judging the testimony of the prosecutrix was planted in the jury's collective psyche by the trial court.

mother worked. (T-111) She kept no clothes at this house, only toys. (T-138-139) The Petitioner, the son of Grandmother Bernice, did not stay at that house. (T-145) He came to Grandmother Bernice's house sometimes while the prosecutrix was there to leave his own children to be watched or to pick them up. (T- 111)

The house where Grandmother Bernice lived was a single family dwelling. (T-238) Grandmother Bernice provided a place for five or six of her great-grandchildren to stay during the day while their parents worked, including the prosecutrix. (T-242-243) The prosecutrix's father, from whom her mother was divorced, was the grandchild of Grandmother Bernice. (T-240) Grandmother Bernice was unable to keep this number of children. Three of her daughters arranged their jobs so that they could assist with the children at regular times. (T-243-244) Petitioner did not spend the night at Grandmother Bernice's house and, according to his sister who helped watch the children, was never alone with the children there. (T-244)

Petitioner categorically denied ever having any sexual contact with the prosecutrix. (T-282-284; 286-288) He has three children of his own aged five to nine. (T-281)

The prosecutrix was allowed over the objections of defense counsel to give a generic description of her alleged sexual encounters with the Petitioner without providing any specifics as to particular events, dates, or location other than the general location of the house where these encounters allegedly occurred.[1] For example, the prosecutor asked such questions as: "Whitney, would you tell the ladies and gentlemen of the jury what specifically

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[1]The trial court in overruling the objection stated, "All of that goes to what the jury might find to be the witness' reliability, sir." (T-114)

would happen?" (emphasis supplied) (T-114); "Whitney, what would be the first thing that *would happen* when you say he *would do* these things to you." (emphasis supplied) (T-114). In response to questions of this type using "would" as a device to allow the witness, over the objection of defense counsel, to give a single generic description of sexual abuse that allegedly occurred many times, the witness described insertion of Petitioner's "private" into her "private", insertion of Petitioner's penis into her mouth, and putting his "hand" in her vagina and on her "behind". (T-113 to 118) The prosecutor asked her to specifically describe only the sex encounters with Petitioner which allegedly occurred when she was "four or five". (T-113)

The witness could not be specific as to the location of these encounters. She testified that "it would happen outside or in the closet, or somewhere where no one could see us." (T-118) She could not be specific as to the number of times these encounters occurred. She testified, "I don't know. It happened a lot of times." (T-119) She could not give any date when any of the alleged encounters took place or relate any of the alleged encounters to any other event such as a holiday. (T-145-146) However, she insisted that her memory was improved over when she first told the story of her sexual encounters with Petitioner, "Because like all these flashbacks start coming back to me, and every time I look at like all these pictures that I took with them, I can just — I start remembering all this stuff." (T-156)

The prosecutrix testified that she stopped going to her Grandmother Bernice's house on a New Year's Eve, of a year she cannot remember, because her mother had a fight with a sister of the Petitioner. (T-120-121) This fight was an actual physical fight in which the aunt pushed her mother down. (T-138) The prosecutrix testified at one point that she stopped going there after this fight for a

period of time. (T120) At another point, she testified that she and her mother went back on the weekends, apparently without a hiatus. (T-139) However, at the competency hearing immediately before trial, out of the presence of the jury, the prosecutrix testified that she had not gone back to her Grandmother Bernice's house since the fight, "Because there has been some arguments between my mother and my aunt, and my mother didn't want to cause any more problems again." (T-80-81)[5]

The prosecutrix also testified that after she and her mother started going back to her Grandmother Bernice's house when she was nine years of age, her cousin, "Ledarious", forced her to have sexual intercourse with him. The evidence would subsequently show that she had no cousin named "Ledarious". (T-249-250) The description of the sexual activity with her cousin was the same as her description of that with Petitioner, including "putting his private in my private" in a closet at Grandmother Bernice's house.[6]

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[5]This change in her testimony on a crucial point between the testimony out of the presence of the jury and her testimony at the trial indicates the she was susceptible to being controlled and guided by adults "assisting" her with her testimony. Her trial testimony would have been fatally impeached by the testimony she did not return to the house of her Grandmother Bernice after her mother's fight since that was the time in which she had earlier claimed her cousin had also had intercourse with her. The change in the testimony after the hearing before the judge sitting alone was essential to the prosecution case.

[6]The witness must have been instructed by someone to use the word "private" instead of "penis" and "vagina" because she demonstrated in other parts of her testimony that she was very familiar with the terms "penis" and "vagina" and their meanings. (T-117) Of course, the use of the term "private" has a more childlike quality and is better calculated to stir the emotions of the jury.

The prosecutrix testified she saw Petitioner at her Grandmother Bernice's after she started going back, but had no further physical contact with him. (T-140)

The prosecutrix admitted that her memory had changed for the better as she talked to her friends and relatives about the alleged sexual contacts. (T-147-148) For example, at the preliminary hearing she had not known Petitioner's name, but now testified she recalled it from her unaided memory. (T-142) At another point she testified the sex with Petitioner ended when she was seven. (T-119) However, she testified later that the sex ended before she was six. (T-140) She testified she remembered things better at trial than she had two years earlier. (T-131;141)

At least one witness described the prosecutrix as precocious, excessively talkative, and liking attention. (T-249) This description is supported by the prosecutrix's unabashed testimony about discussing these alleged sexual encounters with many of her school friends, including boys. (T-133-134) As she testified, "I talked with so many of my friends about it." (T-133)

The prosecutrix testified that when she was eleven years of age she told her mother about her sexual relations with Petitioner that occurred when she was "four or five". (T-123) The alleged occasion for telling her mother was when her mother was talking to her about "women stuff" and asked her "if anything happen (sic) to me like that." (T-124) The prosecutrix then told her mother about the sexual intercourse with Cousin "Ledarious". (T-150) She testified she did not mention the Petitioner's alleged conduct until the next day. (T-150) Her mother, however, testified she told about Petitioner from the first. (T-164)

The prosecutrix was examined by a pediatrician shortly after she told her mother of the above sexual encounters. (T-211) The examination was absolutely normal in every

respect: "We did not find any scar tissue or evidence of trauma or anything that was abnormal." (T-214)

The cousin whom the prosecutrix also accused of having sexual intercourse with her, though she also got his name wrong, took the witness stand and denied ever having any sexual contact at all with her. (T-271-272)

REASONS THE WRIT SHOULD BE GRANTED

I.

The Decision Of The Alabama Court Of Criminal Appeals Conflicts With The Decision Of This Court In *Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) In That It Imposes A Per Se Rule Of Law That The Testimony Of The Victim Of Rape Or Sexual Abuse Is Always Sufficient Evidence To Convict And To Sustain The Conviction On Review And Appeal

The Alabama Court of Criminal Appeals in affirming the conviction held that its decision was governed by two prior Alabama cases: (1) *Pierson v. State*, 677 So.2d 830 (Ala.Cr.App. 1996) holding that "The testimony of the victim alone is sufficient to establish prima facie case of either rape or sexual abuse." (App. A at 2); and (2) *Glover v. State*, 610 So.2d 1253 (Ala.Cr.App. 1992) holding that under Alabama law "once a prima facie case is established, evidentiary issues concerning the weight and credibility of the evidence are not reviewable on appeal." (*Id.*)

The Alabama Court of Criminal Appeals merely echoed the decision of the trial court in denying Petitioner's motion for judgment of acquittal: "Well, sir, as you know, in Alabama we don't require corroboration of a prosecutrix (sic) complaint." (T-227)

The *Pierson* decision stated the Alabama *per se* rule as follows:

> "'In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution.' *Faircloth v. State*, 471 So.2d 485, 489 (Ala.Cr. App.1984), aff'd, 471 So.2d 493 (Ala.1985). In addition, '[t]he testimony of the victim alone is sufficient to establish a prima facie case of either rape or sexual abuse.' *Jones v. State*, 580 So.2d 97, 103 (Ala.Cr.App.1991). See also *Patterson v. State*, 455 So.2d 284 (Ala.Cr. App.1984)." (677 So.2d at 832)

This *per se* rule is in violation of this Court's interpretation of the Fifth Amendment as stated in *Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) In *Jackson*, this Court held that the due process clause prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. (443 U.S. at 309). Second, that the reviewing court "must" consider whether there is *sufficient evidence* to justify a rational trier of fact in finding guilt beyond a reasonable doubt and the court must not restrict its inquiry to whether there is *any evidence* to support the conviction. (*Id.* at 312-313). Third, this Court held that a criminal defendant is entitled to relief if it is found upon the record evidence adduced at trial that no rational trier of fact could have found proof of guilt beyond a reasonable doubt. (*Id.* at 313-314). Fourth, this Court specifically overruled the "no evidence" rule of *Thompson v. Lousiville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), which held that only a conviction based upon a record *wholly devoid* of any relevant evidence of a crucial

element of an offense charged is unconstitutionally infirm. (*Id.* at 314-315) Fifth, this Court held that to constitutionally find guilt beyond a reasonable doubt, the factfinder must rationally apply the evidence in a reasonable manner. (*Id.* at 316-317). Sixth, the Court held that the *Thompson* "no evidence" rule was not adequate to protect against "misapplication of the constitutional standard of reasonable doubt" because a "mere modicum" of evidence would be sufficient to support the "no evidence" rule of *Thompson*, "but it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." (*Id.* at 320). Seventh, the Court held that a criminal defendant against whom there was only slender evidence would be denied due process upon conviction, even if the jury had been properly instructed on the reasonable doubt standard and its requirements. (*Id.* at 320 n. 14)

Petitioner's conviction, based as it is on Alabama's *per se* rule that testimony from alleged victims of one category of criminal offenses automatically meets the constitutional standard, is in violation of the *Jackson* definition of the Fifth Amendment sufficiency of the evidence standard. Courts may not constitutionally create a *per se* rule that the testimony of the alleged victims of a certain type of charged criminal conduct is "always" sufficient to support a criminal conviction since such a *per se* rule may in particular cases violate the "substantial evidence" requirement and in cases such as the instant one leads courts to unconstitutionally affirm criminal convictions based on less than substantial evidence or on irrational jury decisions. The Alabama Court of Criminal Appeals in the instant case used this *per se* rule of law as the sole basis for affirming Petitioner's conviction without any consideration of the content of the evidence actually submitted to determine if it met the constitutional standard. (App. A

at 2) That decision must be reversed and the instant case remanded for a full consideration of whether the evidence in the instant case meets the constitutional standard for sufficiency of the evidence to support a criminal conviction. The Alabama courts' consideration of this question must be free of *per se* rules that arbitrarily categorize the evidence of alleged victims of rape or sexual abuse as automatically sufficient to support a criminal conviction.

Moreover, the type of testimony granted this *per se* status by the Alabama rule is a type of testimony that this Court has severely limited in its decisions. This Court has consistently insisted that eyewitness testimony be especially scrutinized on a case-by-case basis before being admitted. In *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) this Court warned, "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." In *Kyles v. Whitley*, 514 U.S. 419, 444, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Court specifically acknowledged that the testimony of an eyewitness may not be reliable evidence: "Since the evolution over time of a given eyewitness's description can be *fatal* to its reliability [citations omitted] the [witnesses at issue] identifications would have been severely undermined by use of their suppressed statements." This Court has also specifically refused to give the testimony of alleged rape victims any *per se* status or even to hold that such testimony is automatically admissible. In *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), this Court held that the testimony of an alleged victim of a rape identifying a person as the rapist might not even be admissible. This Court made clear that the question of the admissibility of such testimony was to be resolved on a case-by-case basis.

The Alabama *per se* rule is not rational. An alleged victim of rape or sexual abuse might be blind or too mentally retarded or mentally ill to separate reality from fantasy or truth from falsity. Or the testimony might be too fantastic to be rationally believed. Or the defense evidence might show that the accused was castrated or impotent and that it was impossible for the accused to achieve an erection as the victim claimed. Or a DNA test might show that the accused could not have been the attacker. Or the accused might have an absolute alibi.[7] In any of these circumstances, as well as many other conceivable ones, the testimony of the alleged victim might not constitute substantial evidence on which a rational jury could reasonably rely in finding the defendant guilty beyond a reasonable doubt.

The Alabama *per se* rule must be declared unconstitutional. Since it is undisputed that the Alabama courts applied this *per se* rule as the sole basis for denying Petitioner's motion for judgment of acquittal and the subsequent appeal of his claims of the insufficiency of the evidence to convict him, reversal of the conviction is mandated.

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[7]For example, suppose that a number of Federal judges swore that a defendant in a rape case was making a talk to a seminar they were attending in New York at the exact time that a woman claimed the defendant raped her in Los Angeles. No rational jury could disregard the testimony of the Federal judges and base a guilty verdict solely on the testimony of the alleged victim? Yet, such a result is authorized in Alabama court because of its *per se* rule of law, i.e., if the rape victim says so, then there is automatically enough evidence to convict.

II.

Alabama And Other States' Courts, In Conflict With Decisions Of This Court, Have Decided That "Generic Evidence" Of Sexual Molestation Of A Child Under Twelve Satisfies The Fifth Amendment Sufficiency Of The Evidence Standard In Criminal Convictions

The trial court instructed the jury that the prosecution's entire case rested on the testimony of Whitney Levret, the minor prosecutrix:

> "It is apparent in the litigation that the State's case is bottomed squarely on Whitney Leveret's testimony, so I think it would be fair to say that if you should have a reasonable doubt as to the reliability or trustworthy (sic) of Whitney's testimony, then that is tantamount to acquittal. So, what else can I tell you?" (T-324)

The testimony as to the alleged acts of sexual molestation given by Whitney Levert was purely "generic". It is a violation of the due process clause of the Constitution for a rational jury to convict in a child sex abuse case a defendant non-resident in the same residence with the child where, as here, the only evidence *against*[8] the Petitioner is "generic evidence" of sexual abuse of the child on multiple occasions. "Generic evidence" is defined as testimony of a child under twelve years of age that a defendant has committed multiple acts of sexual abuse on her which she cannot relate to time or place or other

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[8]The evidence other than that given by Whitney Levert, the prosecutrix, favored the Petitioner. There was his unimpeached denial under oath, the medical evidence the prosecutrix had completely normal genitalia, including a complete hymen, the testimony of the witness that Petitioner's reputation for truth and veracity was good, and the denial under oath of the other person the prosecutrix accused of having intercourse with her.

details. *Ex parte State of Alabama (Re: R.A.S. v. State)*, 718 So.2d 117 Ala. 1998) and *Ex parte R.L.G., Jr. (In re R.L.G., Jr. v. State)*, 712 So.2d 372 (Ala. 1998). In these cases, the Alabama Supreme Court adopted the "generic evidence" rule allowing conviction of accused *resident* child sexual molesters based solely on "generic evidence". The Alabama court justified adoption of this lesser standard of evidence for situations where " . . . the defendant has lived with the victim for an extensive uninterrupted period and therefore had continuous access to the victim . . . " *Ex parte State of Alabama*, supra, 718 So.2d at 120, quoting *People v. Jones*, 51 Cal.3d 294, 319, 270 Cal.Rptr. 611, 625, 792 P.2d 643, 657 ((1990). In the instant case, the Alabama courts extended and expanded this "generic evidence" rule to include Petitioner who did not meet the requirement of being resident with the child accuser. Even if there is a basis for allowing "generic evidence" to support a conviction of a "resident" accused of child abuse, there is not even an argument for doing so where the defendant is not a resident in the same house with the child accuser.

Even if this Court should conclude that the defendant's residency is not an essential requirement for conviction based on generic evidence, there is no constitutional justification for automatically lowering standards of evidence required to convict to the level of "generic evidence" merely because the prosecution's case depends on the testimony of children under twelve years of age. In several cases, the courts have held that there is no reason to regard children as unreliable witnesses. See, e.g., *R.L.G., Jr. v. State*, 712 So.2d 348, 357 n. 2 (Ala.Cr.App. 1997) (Studies show that "even four-year-olds can accurately recall the basic temporal order of events . . . children are also no more prone that adults to confuse actual frequency of events with imagined presentations.); *People v. Jones*, supra, 51 Cal.3d at 315, 270

Cal.Rptr. at 623, 792 P.2d at 655 ("Recent studies have undermined traditional notions regarding the unreliability of child witnesses, their untruthfulness, susceptibility to leading questions, or inability to recall prior events accurately. Empirical studies have produced results indicating that most of these traditional assumptions are completely unfounded."); and *State v. Arceo*, 84 Haw. 1, 24-26 n. 26, 928 P.2d 843, 86868 n. 26 (1996) (listing scientific studies showing the cognitive abilities of children to be fully capable of making them reliable witnesses).

Justice Scalia in his dissent in *Maryland v. Craig*, 497 U.S. 836, 868, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), states that, "The 'special' reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by 'special' reasons for being particularly insistent upon it in the case of children's testimony." He then cites studies showing that children "are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality."

Either way, inherently unreliable or not, the automatic lowering of the constitutional standards to accommodate childrens' testimony cannot be justified. If the studies showing that the testimony is not inherently unreliable are correct, then no special accommodation is required. If the studies showing inherent unreliability are correct, then special vigilance must be exercised, not relaxed, to prevent the conviction of innocent persons based on such testimony.

The instant case illustrates the evils that result from changing the rules to accommodate the testimony of children. The Alabama courts have approved the use of generic evidence as a means of resolving an alleged "tension between the rights of an alleged victim and the rights of an alleged child molester." *Ex parte R.L.G., Jr.*,

supra, 712 So.2d at 372 The cases do not identify the source of this alleged "tension". The "rights of an alleged victim" are not spelled out in the cases and so they may, as in the instant case, be expanded in varying circumstances without prior notice. Surely, whatever these "rights" are they do not include the "right" to the criminal conviction of another person on less than the quantum and quality of evidence constitutionally required to convict.[9]

The rights of an accused criminal defendant in the guilt phase of his trial are thoroughly spelled out in the United States Constitution as interpreted in the decisions of this Court. One of those rights is that the defendant may only be convicted on "substantial evidence". What is the constitutional source of the right of a child who accuses someone of sexual molestation to *have* that person convicted of a criminal offense on a lesser standard of evidence than is constitutionally required for conviction of other criminal offenses? Indeed, it is a perfectly legitimate question to ask how an abused child could benefit from such a criminal conviction since the benefits of protection and removal from the risk of further abuse is available by administrative remedy under Alabama law.[10]

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[9]The Federal statutes on victims' compensation and allowing victims to testify at the penalty phases of criminal cases are post-conviction matters where the defendants have been adjudicated guilty. The Alabama rules on sexual molestation, and particularly child molestation, unconstitutionally tilt the pre-conviction playing field in favor of the prosecution.

[10]The opinion in *R.L.G., Jr.* further states, "There can be no doubt, as the Court of Criminal Appeals noted, that the legislative policy of this state is to protect the vulnerable child's right to a life free from sexual exploitation." 712 So.2d at 373 There are many Alabama statutes that have been adopted to effectuate the policy of providing civil solutions administered by the Alabama Department of Human Resources to identify, resolve, and protect children from child molestation far more effectively can a belated criminal conviction of the

The truth is that under present law protecting the "rights" of prosecutors to prosecute or not as they please, no "alleged victim" has the right to have an alleged child molester even *charged* with a criminal offense based on the child molestation. Prosecutors have the discretion as to whether or not to bring a prosecution. The alleged victim has no "right" to force prosecutors to even bring charges. *Hunt v. State*, 642 So.2d 999, 1030 (Ala. 1994) ("A prosecutor also has broad authority to decide whether to investigate, determine what charges to bring, when to bring charges, whether to bring charges, and where to bring charges.); *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (So long as the prosecutor has probable cause to believe the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in the prosecutor's discretion. (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) How then can an alleged victim have the "right" to have an alleged child molester convicted of a criminal offense when she has no "right" to even require that the alleged child molester be charged?

The conviction of a person accused of child molestation on "generic evidence" violates the Fifth Amendment. The explanation in *Ex parte State of Alabama (Re R.A.S. v. State)*, supra, 718 So.2d at 119-120, of the grounds on which the court determined that generic evi-

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alleged molester. E.g., *Code of Alabama*, 1975, §§ 26-16-51, et seq, and 26-14-8, et seq. The civil child abuse statutes clearly indicate the legislative intent to protect children from child abuse to give Department of Human Resources (DHR) the power to act as necessary to carry out its responsibility within the parameters established. Protection of children is in the child's best interest and an overriding concern of the public. *Decatur City Bd. of Education v. Aycock*, 562 So.2d 1331 (Ala.Civ.App.1990).

dence alone could sustain a criminal conviction shows with startling brutality the impossibility of Petitioner or any other adult accused of sexual abuse by a child under twelve years of age making any viable defense in Alabama courts:

> "In cases such as this one, trial and appellate courts are required to resolve the tension between the rights of an alleged victim and the rights of an alleged child molester . . . ' There can be no doubt, as the Court of Criminal Appeals noted, that the legislative policy of this state is to protect the vulnerable child's right to a life free from sexual exploitation. . . .[11] In regard to a defendant's due process rights to fair notice of the charges against him and to a reasonable opportunity to present a defense to those charges, we note that in Alabama, clearly, the defendant has no right to notice of the specific time or place of the alleged offense, so long as it occurred within the applicable limitations period . . . *"The fact that the child victim of a resident molester cannot recall or relate specific dates, locations, or other details of the alleged offenses does not inevitably preclude a defense.*[12] [A]s explained

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[11]The court discussed many of the same legal issues that are presented in this case, such as (1) a defendant's due process right to fair notice of the charges against him and to a reasonable opportunity to defend against those charges; (2) a defendant's entitlement to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each offense charged; and (3) the right of a defendant to have his or her conviction sustained only if it is supported by substantial evidence. Nevertheless, the court decided that these rights had to be subordinated to the "right" of children to the conviction of the alleged molester and modified the rules governing the basis on which a defendant could be convicted to accommodate perceived inherent difficulties in children's testimony.

[12]The court obviously believes it is recognizing by this ruling the inherent limitations of child testimony because it justifies it by stat-

> in several decisions, only infrequently can an alibi or identity defense be raised in resident child molester cases. *Usually, the trial centers on a basic credibility issue—the victim testifies to a long series of molestations and the defendant denies that any wrongful touchings occurred.*"[13](emphasis supplied)

In short, in response to Whitney Levert's generic evidence, the only defense the Petitioner had in this case was his mere denial. This made Petitioner's trial a mere ritual in violation of *Jackson.* The prosecutrix was allowed to describe generic sexual conduct by the Petitioner without any regard to time. The Petitioner could then only avoid conviction by proving a negative without being able to show alibi. Generic evidence allowed Petitioner's conviction based on nothing but fantasy. The child witness was given the latitude to omit from the testimony worldly matters such as time, place, and "other details of the alleged offense". The result is cases such as the instant one where the successful condemning testimony is nothing more than that several years ago "he" on a number of unidentified occasions and in unidentified places put his "private in my private". This is not a trial. It is a "yes he did" — "no, I didn't" swearing contest that the adult defendant is sure to lose every time.

Generic evidence is not constitutionally sufficient evidence on which to base any criminal conviction, but particularly a conviction of a heinous crime that will inevitably destroy the life of a human being and greatly impair

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ing the following: "[T]he prosecution clearly has no duty to provide more explicit notice than human nature and science permit." 718 So.2d at 120.

[13]E.g., *People v. Moreno,* 211 Cal.App.3d 776, 787-788, 259 Cal.Rptr. 800 (1989); *People v. Obremski,* 207 Cal.App.3d 1346, 1353, 255 Cal.Rptr. 715 (1989); *People v. Dunnahoo,* 152 Cal.App.3d 561, 572, 199 Cal.Rptr. 796 (1984).

the lives of his wife and children. *Jackson* requires that the evidence be such that it can "fairly" be said to be sufficient for a rational fact finder "with reason" to find guilt of every element of the offense charged beyond a reasonable doubt. *Jackson* insists that the only constitutionally acceptable evaluation of the evidence to support a factfinder's verdict of conviction beyond a reasonable doubt is "reason" and "rationality":

> "The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will *rationally* apply that standard to the facts in evidence. A 'reasonable doubt,' at a minimum, is one *based upon 'reason.' Yet a properly instructed jury may occasionally convict even where it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting without a jury.* In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. Under *Winship*, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand." (emphasis supplied) 443 U.S. at 316.

There is no more likely case in which a factfinder may act irrationally than a case in which the sexual molestation of a child is charged. Such cases severely test the reasonableness of the most rational. They require more, not less, vigilance on the part of the courts to protect the rights of the defendant by requiring rational decision making. The required rationality in this context is the determination based solely on the law and the evidence in the case of the particular defendant's innocence or guilt beyond a reasonable doubt of every element of the

offense charged. The required rationality in this context is not whether a rational jury could decide that the interests of society are better served by convicting all persons accused of particularly heinous crimes on the theory that it is better to convict the innocent than to take the chance that a guilty person might be allowed to further prey on society. It may very well be that the testimony of the alleged victim alone in all cases and circumstances is sufficient to cause a conviction by a jury with the view that its duty to society is to convict every adult a child accuses of sexual molestation rather than take the chance that a child molester will be turned loose to strike again. But, such a jury would not be rational in the constitutional sense.

In *Neder v. United States*, ___ U.S. ___, 119 S.Ct. 1827, 1838 144 L.Ed.2d 35 (1999) this Court reaffirmed that "' . . . the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . '". (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)) The basic holding in *Neder* was that the failure of the trial court to submit to the jury an element of the criminal offense charged and to decide that element himself was subject to harmless error analysis under Rule 52, Fed.R.Crim.P.: "In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, *such that the jury verdict would have been the same absent the error*, the erroneous instruction is properly found to be harmless." (emphasis supplied) (106 S.Ct. at 1837) This Court held that reviewing courts in making the harmless error determination must conduct a thorough review of the record and should not find the error harmless "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding . . . " (119 S.Ct. at 1839) The definition of

the "sufficient evidence" required to avoid harmless error is defined as " . . . whether the record contains evidence that could *rationally* lead to a contrary finding with respect to the omitted element." (emphasis supplied) (*Id.*) The Court held that the absence of such evidence means that the error of not submitting the element of the offense to the jury is harmless error.

Moreover, in order for this Court to authorize courts to predict what a jury would have done given the evidence in the case if the element at issue had been submitted to it, this Court must postulate a jury that only acts rationally since the conduct of an irrational jury could not be predicted. Thus, the rational jury must be constitutionally defined as one that decides guilt or innocence based solely on a rational and reasonable evaluation of the evidence and the legal instructions given to it.

The use of "generic evidence" in this case, i.e., to artificially create sufficient evidence to meet the constitutional standard of evidence sufficient to convince a rational jury of the defendant's guilt beyond a reasonable doubt, is contrary to the decisions of this Court. Reversal is mandated.

CONCLUSION

For the reasons set out above, the Petition for Certiorari in this case should be granted.

Respectfully submitted,

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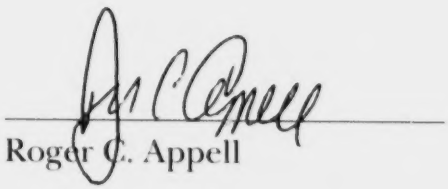
CERTIFICATE OF SERVICE

I certify that the Petition For A Writ Of Certiorari was served on counsel for the State of Alabama and on the Solicitor General of the United States, postage prepaid and properly addressed, this 25th day of October, 1999.



Roger C. Appell

APPENDIX

APPENDIX A

Court of Criminal Appeals
State of Alabama
Judicial Building, 300 Dexter Avenue
P.O. Box 301555
Montgomery, AL 36130-1555

FRANCIS ALLEN LONG, SR.
Presiding Judge
H. WARD McMILLAN
SUE BELL COBB
PAMELA W. BASCHAB
Judges

Clerk's Office
(334) 242-4590

MEMORANDUM

CR-97-2116 Jefferson Circuit Court CC-97-3518

David Phillips v. State

AFFIRMED BY MEMORANDUM.

The appellant appeals from his convictions for sexual abuse in the first degree, a violation of §13A-6-66, Ala. Code 1975, and sodomy in the first degree, a violation of §13A-6-63, Ala. Code 1975. He was sentenced to 10 years' imprisonment on the sodomy conviction and 5 years' imprisonment on the sexual abuse conviction, with the sentences to run consecutively.

The appellant argues that the trial court erred in denying his motion for judgment of acquittal and motion for new trial on the ground that the victim's testimony was unreliable. Specifically, he argues; that there were several inconsistencies in the victim's testimony; that there was no evidence to corroborate the victim's testimony; that

there was no "substantial" evidence of the crimes; and that the victim's testimony was the product of impermissible suggestion by her mother, aunt, friends and social workers.

A person commits first degree sexual abuse when "being sixteen years old or older, [he] subjects another person to sexual contact who is less than 12 years old." §13A-6-66 (a)(3). First degree sodomy occurs when an individual, "being 16 years or older, engages in deviate sexual intercourse with a person who is less than 12 years old." §13A-6-63 (a)(3). Section 13A-6-60(2) defines deviate sexual intercourse as "[a]ny act of sexual gratification between person not married to each other involving the sex organs of one person and the mouth or anus of another." The state's evidence was more than sufficient to establish a prima facie case of sexual abuse and sodomy against the appellant.

The record reveals that the victim, a twelve-year old girl, testified that at the age of four years old, the appellant, her uncle, began to take his hand and "put it in my vagina and on my behind". She testified that he would also put "his private into my private". The victim identified the appellant's "private" as his penis. She testified that the appellant also forced her to perform oral sex on him. The victim testified that the appellant did these things to her several times during a two-year period before she reached her seventh birthday. She further testified that the incidents occurred at her grandmother's house and did not stop until she stopped visiting there. She testified that she told her mother about the incidents when she was ten years old. The appellant was approximately 34 years old at the time that the sexual abuse and sodomy had occurred. The victim's mother testified that, when she learned of the sexual contact, she immediately notified police. A medical examination of the victim was conducted at Children's Hospital but did not reveal any

scar tissue or evidence of trauma. Evidence was presented by the physician who conducted the examination that any damage caused by the appellant's penetration of the victim would have healed within approximately four weeks of the incident.

The State's evidence was sufficient to prove a prima facie case of first degree sexual abuse and first degree sodomy against the appellant. See *Pierson v. State*, 677 So.2d 830 (Ala.Cr.App. 1996) (The testimony of the victim alone is sufficient to establish prima facie case of either rape or sexual abuse.). See also *Snell v. State*, 677 So.2d 786 (Ala.Cr.App. 1995) (The conviction for sodomy in the second degree was supported by the victim's testimony that the defendant performed oral sex on her twice when she was twelve years old.) Therefore, the trial court was correct in denying the appellant's motion for a judgment of acquittal. In reviewing the remaining claims raised by the appellant, we reiterate well-settled law that,, once a prima facie case is established, evidentiary issues concerning the weight and credibility of the evidence are not reviewable on appeal. *Glover v. State*, 610 So. 1253 (Ala.Cr.App. 1992). See also *Ogle v. State*, 548 So.2d 499 (Ala.Cr.App. 1989) (Conflicting evidence, moreover, always presents a jury question, and a verdict rendered thereon will not be disturbed on appeal.)

The judgment of the trial court is affirmed.

All judges concur.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA
August 20, 1999

1981118

Ex parte David Phillips. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: David Phillips v. State) (CR-97-2116) (Jefferson Cir.Ct.No.: CC-97-3518)

CERTIFICATE OF JUDGMENT

WHEREAS, on June 10, 1999, a Writ of Certiorari to the Court of Criminal Appeals was granted by this Court, and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure,

WHEREUPON, come the parties and the Petition for Writ of Certiorari being submitted and duly examined and understood by the Court, it is considered by the Court that the writ heretofore issued should be quashed and that the petition should be denied.

IT IS THEREFORE, CONSIDERED AND ORDERED that the Writ of Certiorari heretofore issued to the Court of Criminal Appeals, be, and the same is hereby, quashed, and the Petition for Writ of Certiorari be, and the same is hereby, denied. NO COSTS TAXED.

HOUSTON, J. — Hooper, C.J., and Maddox, Cook, See, Lyons, Brown, and Johnstone, JJ., concur.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 20th day of Aug., 1999.

/s/ Robert G. Esdale, Sr.

Clerk, Supreme Court of Alabama

APPENDIX C

Ala. Code 1975 § 13A-6-63

CODE OF ALABAMA

TITLE 13A. CRIMINAL CODE.

CHAPTER 6. OFFENSES INVOLVING DANGER TO THE PERSON.

ARTICLE 4. SEXUAL OFFENSES.

§ 13A-6-63. Sodomy in the first degree.

(a) A person commits the crime of sodomy in the first degree if:

(1) He engages in deviate sexual intercourse with another person by forcible compulsion; or

(2) He engages in deviate sexual intercourse with a person who is incapable of consent by reason of being physically helpless or mentally incapacitated; or

(3) He, being 16 years old or older, engages in deviate sexual intercourse with a person who is less than 12 years old.

(b) Sodomy in the first degree is a Class A felony.

C-2

Ala. Code 1975 § 13A-6-66

CODE OF ALABAMA

TITLE 13A. CRIMINAL CODE.

CHAPTER 6. OFFENSES INVOLVING DANGER TO THE PERSON.

ARTICLE 4. SEXUAL OFFENSES.

§ 13A-6-66. Sexual abuse in the first degree.

(a) A person commits the crime of sexual abuse in the first degree if:

(1) He subjects another person to sexual contact by forcible compulsion; or

(2) He subjects another person to sexual contact who is incapable of consent by reason of being physically helpless or mentally incapacitated; or

(3) He, being 16 years old or older, subjects another person to sexual contact who is less than 12 years old.

(b) Sexual abuse in the first degree is a Class C felony.